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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

RAJOHN CHARLES DOUGLAS,

Defendant and Appellant.

B288534

(Los Angeles County
Super. Ct. No. VA103562)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvonne T. Sanchez, Judge. Reversed and remanded.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Rajohn Charles Douglas was convicted by jury of three counts of second degree robbery (Pen. Code, § 211)¹ and two counts of second degree commercial burglary (§ 459). He was sentenced to a term of 28 years 4 months. Appellant filed a petition under Proposition 47 to reduce his burglary convictions to misdemeanors.² The trial court denied the petition without holding an evidentiary hearing. The sole contention on this appeal is whether the trial court erred in failing to hold an evidentiary hearing. Respondent concedes that the failure to hold a hearing was error and that the matter accordingly should be remanded. We agree and therefore reverse and remand for an evidentiary hearing. Appellant has the right to counsel and the right to be present at the hearing.

BACKGROUND

Appellant was convicted of two counts of second degree commercial burglary. (§ 459.) The first was based on an offense committed at Universal Jewelry on September 27, 2007 (count 3), and

¹ Unspecified statutory references will be to the Penal Code.

² “Proposition 47, enacted by California voters in November 2014, reduced certain felony theft-related offenses to misdemeanors when the value of the stolen property does not exceed \$950. The initiative also created a procedure to allow defendants who previously suffered felony convictions for offenses that are now classified as misdemeanors under Proposition 47 to petition the trial court to reduce their convictions to misdemeanors and to resentencing them, if they are still serving time on their convictions. (Pen. Code, § 1170.18, subds. (a), (f).)” (*People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1282.)

the second was based on an offense committed at K & A Jewelry Store on October 15, 2007 (count 6). His prison term included two-year sentences on each of counts 3 and 6, both stayed pursuant to section 654.

On December 20, 2017, appellant filed a Proposition 47 petition in propria persona, seeking to reduce the felony robbery and burglary convictions to misdemeanors on the ground that the amount in question was not more than \$950. He also requested a resentencing hearing.

On January 25, 2018, the trial court called the case for a hearing, but appellant was not present and was not represented by counsel. The court stated that appellant's robbery counts were not eligible for resentencing and continued the hearing.³ The following day, the prosecutor asserted that appellant was ineligible for resentencing because appellant "stole in excess of \$11,000 worth of property and damage [*sic*] to the stores." Appellant again was not present and was not represented by counsel. The court denied the petition on the ground that the value of the property taken exceeded \$950. Appellant timely appealed.

DISCUSSION

Proposition 47 "added several new provisions, including Penal Code section 459.5, which created the crime of shoplifting. Subdivision (a) of section 459.5 provides: 'Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to

³ Appellant does not challenge this finding on appeal.

commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary.’ Shoplifting is punishable as a misdemeanor unless the defendant has previously been convicted of a specified offense. (§ 459.5, subd. (a).) . . . [¶] Section 1170.18 now permits a defendant serving a sentence for one of the enumerated theft or drug offenses to petition for resentencing under the new, more lenient, provisions.” (*People v. Gonzales* (2017) 2 Cal.5th 858, 863, fn. omitted.)

“The ultimate burden of proving section 1170.18 eligibility lies with the petitioner. (See Evid. Code, § 500.) In some cases, the uncontested information in the petition and record of conviction may be enough for the petitioner to establish this eligibility.” (*People v. Romanowski* (2017) 2 Cal.5th 903, 916.)

“An applicant is entitled to relief if he or she has committed a qualified crime and has no disqualifying prior conviction and is not required to register as a sex offender. (§ 1170.18(g).) . . . [citation.] . . . [¶] The screening of the application will be based on the court’s file, including the petitioner’s record of convictions. . . . [¶] The initial screening must be limited to a determination of whether the applicant has presented a prima facie basis for relief under section 1170.18. At this level of review, the court should not consider any factual issues such as the value of any property taken regarding any qualified theft crimes.’ [Citation.]

“However, when eligibility for reclassification ‘turn[s] on facts that are not established by either the uncontested petition or the record of conviction . . . an evidentiary hearing may be “required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner’s entitlement to relief depends on the resolution of an issue of fact.” [Citations.]’ [Citation.]” (*People v. Washington* (2018) 23 Cal.App.5th 948, 953-954 (*Washington*).)

Appellant completed the form adopted by the Los Angeles Superior Court for Proposition 47 petitioners. “The form requires the petitioner to sign a statement informing the court of (1) the felony of which he was convicted, and (2) the date of his conviction. The form also gives the petitioner the option of checking a box stating, ‘The amount in question is not more than \$950.’ The form does not provide space for a petitioner to write in additional information about the stolen property, nor does it indicate that the petitioner is required to, or even may, attach any evidence to the form.” (*Washington, supra*, 23 Cal.App.5th at p. 955.) Appellant checked the box indicating that the amount in question is not more than \$950. Appellant accordingly met his prima facie burden of establishing his eligibility for resentencing. (*Id.* at p. 957.)

The prosecution opposed the petition on the ground that the value of the stolen property exceeded \$950. However, “this fact is not established by the record of the initial plea or conviction.” (*Washington*,

supra, 23 Cal.App.5th at p. 957.) The trial court therefore should have held an evidentiary hearing to determine the value of the property taken. (*Ibid.*)

Appellant further argues that the prosecution’s assertion at the hearing erroneously combined both burglary counts and included “damage to the stores.” We agree with appellant that this was error for two reasons.

First, each count must be considered separately. (See *People v. Perkins* (2016) 244 Cal.App.4th 129, 141 [where defendant was convicted of three counts of stealing a firearm, he “would be entitled to resentencing on each conviction, provided he can meet his burden of showing, separately for each firearm, that its value does not exceed \$950”].) The value of the property stolen cannot be combined for the separate counts but instead must be considered separately. Second, the prosecution included “damage to the stores” in her assertion that the value of the property stolen exceeded \$950. The question is whether “the value of the property that is taken or intended to be taken” exceeds \$950. (§ 459.5, subd. (a).) Damage to the stores is not pertinent.

Appellant further contends that the trial court violated his constitutional rights to counsel, to present evidence, and to confront witnesses at the hearing. “At least one commentator has suggested that there is no right to counsel in connection with *the preparation of the petition*. [Citation.]” (*Washington, supra*, 23 Cal.App.5th at p. 953, italics added.) However, *Washington* went on to state that, when the superior court holds an evidentiary hearing at which the value of the

property taken is to be considered, “it is likely that a petitioner will be afforded counsel who can ably present evidence on the disputed factual issues.” (*Id.* at p. 957, citing Couzens et al., Sentencing California Crimes (The Rutter Group 2018) § 25.15 [“Since section 1170.18 allows a person to seek ‘resentencing’ or ‘reclassification,’ it would appear the person has a right to counsel in any court proceeding where the merits of the application are considered.”]; see also *People v. Rouse* (2016) 245 Cal.App.4th 292, 301 [“when a defendant currently serving a felony sentence presents a petition pursuant to section 1170.18, subdivision (a) and is found eligible for resentencing, that defendant is entitled to the assistance of counsel at resentencing in every case involving a judgment of conviction of more than one felony such that the court has discretion to restructure the sentence on all counts”].) Moreover, “where, as in this case, a factual contest bearing on eligibility for Proposition 47 relief requires that an evidentiary hearing be held, . . . the petitioning defendant has a right to be present, absent a valid waiver.” (*People v. Simms* (2018) 23 Cal.App.5th 987, 998.)

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DISPOSITION

The judgment is reversed and the matter remanded for an evidentiary hearing on appellant's eligibility for resentencing under Proposition 47.

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WILLHITE, Acting P. J.

We concur:

COLLINS, J.

DUNNING, J.*

*Retired Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.